United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

75-1243

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

- x

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

-against-

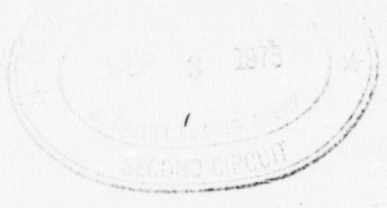
GREGORY CHU, T/N DONALD GEE,

Defendant-Appellant.

- x

BRIEF FOR DEFENDANT-APPELLANT

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK



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PRELIMINARY STATEMENT

This is an appeal from a judgment of conviction imposed by Hon. Milton Pollack following a jury trial. The defendant was convicted of unlawfully distributing and possessing with intent to distribute a Schedule I narcotic drug controlled substance, approximately 26.80 grams of heroin, in violation of 21 U.S.C. Sections 812, 841(a)(1) and 841(b)(1)(A). He was sentenced to ten years in prison under 18 U.S.C. Section 4082.

ISSUES PRESENTED

(1) DID THE COURT BELOW ERR IN ADMITTING EVIDENCE OF A PRIOR CRIME WHERE SUCH EVIDENCE COULD ONLY BE USED

TO SHOW DEFENDANT'S CRIMINAL DISPOSITION?

(2) WHERE THE DEFENSE CALLED A WITNESS SIMPLY TO IMPEACH A PRIOR GOVERNMENT WITNESS, DID THE COURT ERR IN PERMITTING THE GOVERNMENT TO CROSS-EXAMINE THE DEFENSE WITNESS ON MATTERS COLLATERAL TO HIS DIRECT TESTIMONY, INCLUDING PRIOR CRIMINAL CONDUCT OF THE DEFENDANT?

STATEMENT OF THE CASE

Alfred Visciarelli

Alfred Visciarelli, a wholesale seafood dealer, formerly worked for the New York State Police (14*). On August 30, 1972 at 8:00 p.m. he was at 179th Street and Broadway with Patrolman Berk, Sgt. Rawald and Mike Colombo, a cooperating individual (15).

Visciarelli and Colombo went to an overlook at the Henry Hudson Parkway and West 189 Street (17). They parked and waited. Other surveillance cars were there as well (18). Three or four minutes later, a green foreign car pulled up and parked about 60 feet from Visciarelli and Colombo (21, 31). Inside were two males, one Oriental and one white; the Oriental was driving. It was now about 8:30 p.m. (21).

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*References are to the Record on Appeal.

The white fellow exited the car and walked to Mr. Colombo, who introduced him to Visciarelli as Barry. Barry was later identified as Barry Cohen, a co-defendant (22).

Visciarelli showed Barry $1,700 in cash. Barry then returned to the green car, "reached in and received a package from the driver of the car, the Oriental." He returned with the package and received the money (23-4). Visciarelli complained that the price was too high. Barry answered, "Don't worry, it's good stuff. It can take a five cut " (24). Visciarelli and Colombo then left the overlook (25).

On cross-examination, Visciarelli stated that the entire transaction from the time the foreign car pulled up until it pulled away lasted five minutes (32). Visciarelli also stated that when Cohen returned to the foreign car, "he went to the driver's side of the car," next to the window. No door opened while he was there. He was there for about half a minute, then turned and walked back to Visciarelli and Colombo. While there, he was facing the car (35).

Prior to arriving at the meeting place, Colombo had told Visciarelli that Cohen "could do weight in heroin." Visciarelli said that this meant that he could deal in "an ounce or more quantity in heroin " (37).

Stephen Berk

Berk, a New York City Policeman (39), established a "mobile surveillance" of the overlook during the transaction (40). A mobile surveillance "is when you remain in your car and your car can be temporarily stationary but mostly moving and you observe one particular location." Berk made a circle, going north and south on the Henry Hudson Parkway, so that he passed the overlook three or four times (41). At one point, he entered the overlook, made a "mental note of the license plate" on the foreign car and "turned and looked at the driver" (42). Subsequently, Berk checked and discovered that the foreign car's license place number (7277 VG) was registered to Larry Sky (44).

(It was subsequently stipulated that if called, the Government chemist would testify that the substance obtained by Visciarelli weighed 26.80 grams of which about 7.2 percent was heroin (52).)

Prior to August 30, Berk had talked with Colombo. Colombo told him that he had been talking to Barry Cohen and that Cohen had informed Colombo that Cohen had some good heroin to sell. Cohen also told Colombo that if Colombo knew anyone interested in purchasing an ounce of heroin, Colombo should bring that person around (64-5).

Gerard Miller

Miller was employed by the Drug Enforcement Administration of the Justice Department. At the time he was Group Supervisor for the DEA New York Joint Task Force. He was sitting in a car on the overlook during the events of August 30 (70-1). While substantially corroborating the prior testimony, Miller added the following additional or different points:

1. When Cohen returned to the foreign car, "the person who was behind the wheel half stepped out of the car and then went back into the car." This permitted Miller to determine that the driver was "Oriental in appearance" and to describe him in slight detail (73).

2. When Cohen returned to the foreign car, he approached "the driver's side and . . . leaned into the car." (74) "His head and his arms were partially inside. I did not see anything specifically happen other than movement" (75).

3. Miller could observe Visciarelli, Colombo and Cohen "conversing with one another and I saw them huddled together on a couple of occasions." But he "really couldn't determine what was going on," though he was watching (78-80, 81).

Larry Sky

Mr. Sky testified that he owned the green foreign car (a Peugeot) seen at the rendezvous on August 30, 1972 and that he had lent it to the defendant during August, 1972 (83-5).

Barry Cohen

Cohen was a co-defendant in the case who had entered a guilty plea in March, 1972 and was sentenced April 23, 1972 to a three-year suspended sentence with three months in a jail-type institution, and 33 months on parole. At the time he testified, he was still on parole (88-9).

In March 1972, Cohen's friend, Fred Rosen,introduced him to the defendant (90-1). At that time, there was a conversation about Cohen's car, which had about $500 or $600 in damage. Cohen was working to save up money to repair the car. The defendant offered to lend him the money, to be paid back whenever Cohen wished without interest. Cohen accepted (92).

During the first week of August, 1972, the defendant told Cohen that he needed the money repaid. The defendant said that it could be repaid if Cohen "could possibly turn a drug deal for him." A few days later, Mike Colombo, a neighborhood friend of Cohen's, asked Cohen if Cohen knew of someplace that Colombo could get heroin. Colombo wanted an

ounce or half ounce for a friend from Binghamton. Cohen said he'd get back to Colombo (93-5).

Cohen contacted the defendant who told him that an ounce would cost $1,700 and would allow defendant to make sufficient profit to cancel Cohen's debt, though Cohen would get no money himself (96).

After several more conversations with the defendant, on August 28, 1972, the defendant told Cohen that he had an ounce of heroin for $1,700 in his possession and final arrangements could be made. Cohen then arranged with Colombo for the sale. On August 30, the defendant called Cohen, who instructed the defendant to pick him up about 8:00. The defendant arrived in a green Peugeot (98-9).

Cohen and the defendant drove to the Henry Hudson overlook, where Colombo and Visciarelli were already waiting. The defendant instructed Cohen to make certain the buyers had the money (100). Colombo introduced Cohen to Visciarelli, who showed Cohen the money. Cohen then went back to the car for the drugs and exchanged them for the money (102). Cohen returned to the Peugeot, gave the defendant the money and was informed that his debt was cancelled. Cohen was subsequently arrested (103).

On cross-examination, Cohen testified to the following additional relevant points:

1. Cohen knew Colombo ten years and knew him to be an addict (104), though Cohen himself never sold any narcotic

substance to Colombo. Cohen knew Fred Rosen 12 or 15 years. Rosen used to be an addict (105). Cohen has himself never used heroin, though he had seen it "in high school taking certain courses on drug abuse. It was also shown to me while I was in the Army for two years on drug courses." Cohen never used any drug other than marijuana (106-7).

2. Cohen knew the defendant a week or two before the defendant offered him $500 to fix his car (107).

3. It was just a coincidence that Colombo asked him about heroin a couple of days after the defendant had suggested that Cohen could cancel his debt by helping to make a sale (108), though Colombo had never before approached Cohen about getting heroin (108).

4. Cohen never told Colombo that he would be "able to sell him weight in heroin" (109).

5. Cohen never mentioned that the heroin he was selling was "five-cut heroin" (109).

6. Cohen believed the term "five-cut heroin" meant "that the heroin has been cut down five times " (110).

7. Cohen never participated in any narcotic transaction in any capacity (110).

Cohen was then questioned about his financial resources and answered, in substance, as follows:

8. At the time he borrowed $500 from the defendant, he was earning $135 a week at Wolfson Casing Corp. (Wolfson). He had started that job about the time of the loan (112).

9. Before that he was a cameraman for Cable TV, earned a base salary of $125 a week for 35 hours plus substantial overtime up to 60 hours a week (113). He had worked in this job for about two years (113, 115).

10. During this entire period, he was living with his parents (114).

11. Other than his income from Wolfson and as a cameraman, Cohen received $59 a month disability pay for a service-connected injury (116).

12. When Cohen met Colombo after the defendant had suggested cancelling the debt by helping with the drug sale, it was Colombo who made the overture about a source of heroin (119).

13. Cohen needed money to fix his car because someone had backed into the front of it (120). Cohen never went to the insurance company, though he had insurance, because he was afraid that his rates would go up (121).

Cohen also testified to the following additional relevant facts regarding the drug sale:

14. After corroborating that Visciarelli and Colombo had the money, Cohen returned to the Peugeot's passenger side, opened the door and got in (125).

DEFENDANT'S CASE

Michael Colombo

The direct testimony of Mr. Colombo occupies approximately one page of the trial transcript (133-4) and it is reproduced in full below:

Q. Mr. Colombo, do you know someone named Barry Cohen?

A. Yes.

Q. How long do you know him?

A. A few years.

Q. Have you ever bought cocaine from Mr. Cohen?

A. Yes.

Q. Have you ever bought heroin from Mr. Cohen?

A. Yes.

Q. About how many times in your life have you bought cocaine and heroin from Mr. Cohen?

A. 50, 100.

Q. Did you see Mr. Cohen shoot heroin into himself?

A. Coke.

Q. Did you ever see him snort heroin or coke?

A. Yes.

Q. I call your attention to August 1972. Did you make a deal in that month to buy some heroin from Mr. Cohen?

A. Yes.

Q. Who instigated that deal?

A. Barry.

Cross-Examination of Mr. Colombo

During the summer of 1972, Cohen told Colombo that he owed the defendant money (136). Cohen told Colombo he was "working his debt off" and Cohen instigated a drug deal with Colombo in August, 1972 (137). Cohen had told Colombo that the source of his drugs was a Chinese person named Ricky (137).

Colombo then corroborated much of the prior testimony regarding the drug sale at the Henry Hudson overlook (138-43). An objection on the ground that the questions went beyond the scope of the direct examination was overruled (143). The questions continued (143-5).

Colombo was then asked about a transaction that occurred two months prior to August 1972, when Cohen came to Colombo's home (145-6). Again the testimony was objected to on the ground that it went beyond the scope of the direct, but this was overruled on the ground that "the inquiry may be considered pertinent to motive and intent in the transaction

under indictment " (146). Colombo then said that Cohen came by Colombo's home and honked his horn to see whether Colombo wanted to make a purchase. Colombo indicated that he did and Cohen went upstairs to Colombo's apartment (146-7). At this point, there was an additional objection on the ground that substantively the evidence is inadmissible aside from the ground that it is beyond the scope of the direct." Both objections were overruled (147).

Colombo then testified that he told Cohen he wanted "a spoon" and they both went to Cohen's apartment (147-8). Ten minutes later, someone introduced to Colombo as "Chu" arrived (148), Chu and Cohen walked out of the room, Chu left and Cohen returned with the heroin (148-50).

Redirect Examination

On redirect, Colombo testified that Cohen did not like to deal in drugs directly. "Mostly I collected the money in the neighborhood. He didn't like to see too many people. He didn't want his name on the street. So he used to come to me, I used to get the people's money and I used to be the one the people contacted " (151).

ARGUMENT

POINT I:

THE TRIAL COURT ERRED IN ADMITTING EVIDENCE OF DEFENDANT'S PRIOR CRIMINAL ACT.

The Only Issue for the Jury

In summation, defense counsel emphasized one issue: the prosecution had failed to prove beyond a reasonable doubt that the defendant had actually participated in the drug transaction. He argued that, at most, the evidence showed the defendant's "mere presence" at the scene of the crime (174-8). Defense counsel requested and the Court gave instruction on this point (199). Defense counsel stressed in summation that Cohen had lied to the jury about his drug involvement, that he had been involved in 50 to 100 drug transactions, as Colombo himself had testified, and that he was attempting to shift the responsibility to the defendant in order to avoid a harsh sentence at his plea in 1973 (176-8). Defense counsel asked the jury to believe that the deal at the Henry Hudson overlook was Cohen's exclusively and, whatever crimes the defendant had committed with respect to controlled substances in the past, there was not sufficient proof to convict him of the August 30 sale (177).

The Law On Other Criminal Acts

The law is clear.

> This Court has held that evidence of other criminal offenses is admissible if it is relevant for some purpose other than merely to show a defendant's criminal character, provided that its potential for prejudicing the defendant does not outweigh its probative value. United States v. Papadakis, 510 F. 2d 287, 291 (2d Cir. 1975).

The Papadakis Court traced the history of the rule. Originally, the rule was exclusionary. Such evidence was inadmissible unless it proved knowledge, intent, or design. Today, in this Circuit, the rule is inclusory. It is admissible, if relevant, except to prove criminal character. Id.

This case does not turn on whether the rule is inclusory or exclusionary. Despite the Court's charge that the prior criminal transaction could only bear "on the question of the motive and intent" of the defendant (197), in fact, motive and intent were never an issue. The only purpose for which the evidence could possibly be used by the jury was the unacceptable one, even under the inclusory rule, of showing "disposition, propensity or proclivity of [defendant] to commit the crime charged." United States v. DeCicco, 435 F. 2d 478, 483 (2d Cir. 1970).

Examples of the Inclusory Rule

When has the inclusory rule resulted in the admission of other crimes? An analysis of such cases will show a rationale for admission which cannot be found in the facts here.

1. Evidence of other crimes may be received where the defense has raised or intends to raise an issue of entrapment or where the defendant puts "into issue his motive and intent to commit the crimes charged." United States v. Cohen, 489 F. 2d 945, 950 (2d Cir. 1973).

2. Evidence of other crimes has been admitted where the defendants, charged with possessing and distributing cocaine, maintained that they had gone to the transaction not to sell cocaine but to buy marijuana. United States v. Brettholz, 485 F. 2d 483, 488 (2d Cir. 1973).

3. In fraud cases, evidence of similar acts is admissible either (a) to show knowledge or intent where these are in issue or (b) "to establish the existence of a larger continuing plan or design" where the actual making of the misrepresentation is in issue. United States v. Birrell, 447 F. 2d 1168, 1172 (2d Cir. 1971).

4. Evidence of similar acts, including crimes, is admissible to disprove the statements of a testifying defendant. United States v. Cuadrado, 413 F. 2d 633, 635 (2d Cir. 1969).

5. Evidence of similar acts will be admitted where the defendant takes the witness stand and puts his state of mind in issue. United States v. Kaufman, 453 F. 2d 306, 311 (2d Cir. 1971).

United States v. DeCicco

Apparently, United States v. DeCicco, supra, is the one recent case where evidence of prior similar acts was held improperly admitted. In DeCicco, the defendants were charged with conspiring to transport certain stolen art works in interstate commerce. The main witness against them was a Government informer named Paul Parness. In addition to substantive testimony tending to prove the defendants' guilt of the crime, Parness was permitted to testify about a prior similar act involving two of the defendants.

The Court said that such evidence was "compensatingly probative if the element of intent, etc. is placed in issue in the case at trial, either by the nature of the facts sought to be proved by the prosecution or the nature of the facts sought to be established by the defense." United States v. DeCicco, supra at 483. Here, however, the defendants did not claim that they stole the goods but did not intend to transport them in interstate commerce, or that they did not believe the art works were stolen, or that they did not know what they were doing. The "defense's only hope

in this case was to attack Paul Parness's credibility and thereby to raise a reasonable doubt about the veracity of his account of what the defendants did or said. . . . Therefore, whatever probative value the prior crimes . . . added to the prosecution's case on the issue of defendants' intent . . . was far outweighed by the unwarranted inference . . . that the defendants . . . were a continuing band of art treasure thieves and 'fencers.'" United States v. DeCicco, supra at 484.

The Present Case

There was no entrapment claim here (United States v. Cohen). The defendant did not testify that his intent was to do something other than the crime charged (United States v. Brettholz). There is no question of intent to defraud or misrepresent (United States v. Birrell). The defendant did not testify in his own behalf (United States v. Cuadrado; United States v. Kaufman). As in DeCicco, intent was not in issue.

This is not a case where the defendant asserted that he did not recognize heroin or that he never dealt with it before or that he didn't know why he was at the overlook or that he was there to deal in a different contraband.

The only issue in this case was whether the prosecution had proved that the defendant had participated in the

offense. The defendant had a right to argue to the jury that "mere presence" at the scene of a crime is not enough to make him guilty, even if the presence is knowing. United States v. Garguilo, 310 F. 2d 249, 253 (2d Cir. 1962); United States v. Terrell, 474 F. 2d 872, 875 (2d Cir. 1973). The Court below instructed the jury that the prior act could only be used to show motive and intent (197). But motive and intent are irrelevant here. The issue is whether the prosecution had proved that the defendant had committed criminal acts. He could have knowingly been at the scene of a drug transaction, intending to be there, and yet still enjoy the Garguilo-Terrell defense of "mere presence." Consequently, the only valid purpose for which the jury could have considered the prior similar act was "to show the criminal character or disposition of the defendant." United States v. Brettholz, supra at 487.

DeCicco is directly in point here. There, as here, there might have been some slight probative value "on the issue of defendants' intent" but the "unwarranted inference" of criminal disposition "far outweighed" the probative value on intent. This is especially true here, where the defendant's theory of the case subsumed the issue of intent.

Similarly, in DeCicco, the defendants' strategy was to discredit the major witness against them. Evidence of similar acts was irrelevant to that strategy. Here, the defendant called Colombo briefly to show that Cohen had

entirely fabricated his own involvement with drugs and the degree of his participation in the August 30 sale. As in DeCicco, defendant here is not making any assertion that would put his intent in issue but was simply trying to discredit the major witness against him.

In United States v. Vario, 484 F. 2d 1052, 1056 (2d Cir. 1973), this Court said that evidence of prior similar acts would be admissible "only if it is substantially relevant to some other purpose than to prove criminal character." Defendant respectfully suggests that the evidence in this case is "substantially relevant" to show criminal character only. There was no other issue in the case with regard to which the prior acts can be said to have crossed the threshold of substantiality. Under these circumstances, the potentiality of such evidence "for prejudicing the defendant does . . . outweigh its probative value' and should have been excluded. United States v. Papadakis, supra.

POINT II:

THE TRIAL COURT ERRED IN PERMITTING THE GOVERNMENT TO CROSS-EXAMINE COLOMBO SUBSTANTIALLY BEYOND THE SCOPE OF HIS DIRECT TESTIMONY.

In this Circuit, the 'rule with respect to the scope of cross-examination continues to be that it is limited to the 'subject matter of the examination in chief,' or in

more modern parlance to 'the limited scope of the direct examination.'" United States v. Lewis, 447 F. 2d 134, 139 (2d Cir. 1971); United States v. Minuse, 142 F. 2d 388, 389 (2d Cir. 1944); United States v. Dardi, 330 F. 2d 316, 333 (2d Cir. 1964).

Here, the defense spent approximately one transcript page questioning Colombo. It established two points: (1) contrary to Cohen's testimony, he had been a drug user for at least several years and had sold drugs to Colombo between 50 and 100 times; (2) contrary to Cohen's testimony, he instigated the sale of heroin to Colombo on August 30, not the other way around. Each of these points impeached the credibility of Cohen, the primary witness against the defendant.

On cross-examination, the Government was allowed to ask Colombo about the defendant's participation in prior, unrelated drug transactions, elicit Cohen's statements to Colombo regarding Cohen's general drug involvement with the defendant and develop Colombo's testimony on the defendant's participation in the August 30 sale. The cross-examination did not even encompass the two, brief impeaching points elicited on direct examination.

Of course, the Government is free to call its witnesses and to question them, in a non-leading way, about whatever it wishes, consistent with the rules of evidence. But here, the Government had rested and the defendant simply wanted to show the jury that Cohen had lied. The Government

was free to cross-examine Colombo to prove that Cohen had not lied, but it should not have been permitted to re-introduce, through Colombo, on cross-examination, new and unrelated substantive evidence.

CONCLUSION

The conviction should be reversed and a new trial ordered.

Respectfully submitted,

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